MOTION FILED
OCT 5 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-857 and 78-997

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

YESHIVA UNIVERSITY

YESHIVA UNIVERSITY FACULTY ASSOCIATION,
Petitioner,

v.

YESHIVA UNIVERSITY

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION BY THE TRUSTEES OF BOSTON UNIVERSITY FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF YESHIVA UNIVERSITY AND BRIEF OF THE TRUSTEES OF BOSTON UNIVERSITY AS *AMICUS CURIAE*

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION BY THE TRUSTEES OF BOSTON UNIVERSITY FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF YESHIVA UNIVERSITY

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Trustees of Boston University ("Boston University") respectfully move the Court, pursuant to Supreme Court Rule 42(2), for leave to file the accompanying brief *amicus curiae* in support of Respondent Yeshiva University, and urging affirmance of the decision of the United States Court of Appeals for the Second Circuit.[1] In support of this Motion, Boston University states as follows:

1. Boston University is a private, nonprofit educational institution incorporated under the laws of the Commonwealth of Massachusetts, and located in Boston. It is composed of 16 Schools and Colleges having a student enrollment of approximately 20,000. It employs approximately 5,500 employees, of whom approximately 2,200 are instructional personnel.

2. The issue presented in this case is whether the Court of Appeals correctly found that Yeshiva University's full-time faculty members are supervisory and/or managerial personnel, and therefore not "employees," within the meaning of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151 *et seq.* ("the Act"). The Court of Appeals, reversing the National Labor Relations Board, and relying upon the faculty members' exercise of substantial decision-making authority regarding hiring, promotion, tenure, and academic policy, held that Yeshiva's faculty members were supervisors and/or managerial employees. The Court of Appeals thereby disapproved a long line of NLRB decisions holding that full-time faculty members are "employees" entitled to the protections of the Act.

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[1] *NLRB* v. *Yeshiva University*, 582 F.2d 686 (2d Cir. 1978), *cert. granted*, 99 Sup. Ct. 1212 (1979).

3. The decision in this case will, in all likelihood, have an immediate effect upon Boston University and its faculty members. In No. 78-67, October Term, 1978, Boston University petitioned this Court for a writ of certiorari to the United States Court of Appeals for the First Circuit to review that court's decision in *Trustees of Boston University* v. *N.L.R.B.*, 575 F.2d 301 (1st Cir. 1978). That petition is pending before the Court. In the latter decision, the Court of Appeals enforced a Board order requiring Boston University to bargain with the American Association of University Professors as representative of a unit of full-time faculty members, including department chairmen. Boston University urged before the Court of Appeals, and continues to urge in its pending certiorari petition, that its department chairmen are supervisory and/or managerial employees. Thus, a decision favorable to Yeshiva University in the case before the Court will, almost certainly, necessitate a remand of the Boston University case to the First Circuit; and, even if this Court reverses the *Yeshiva* decision, the rationale enunciated may nevertheless require such a remand.

4. Boston University supports the decision of the Second Circuit in *Yeshiva*. However, it cannot seriously be disputed that the matter of supervisory or managerial status of academic department chairmen raises an "easier" question than that presented in *Yeshiva*. Thus, department chairmen typically exercise supervisory and managerial powers greater than, and different in kind from, those exercised by faculty, as a class, at institutions of higher education. Accordingly, even if the Court concludes —contrary to our assessment of the facts of academic

life and what we consider to be the correct decision of the Second Circuit in the *Yeshiva* case—that full-time faculty members are "employees," the same result would not, and should not, follow for department chairmen. Additionally, we point out that recognition of the supervisory and managerial status of department chairmen would have a relatively minor impact on collective bargaining in higher education.

5. No party or *amicus* herein has presented to the Court a considered statement as to the status of university department chairmen. We respectfully submit that it is appropriate for the Court to be made aware of their status so that its decision in *Yeshiva* will be made with full knowledge of the impact the decision will have on such personnel. We attempt, in the accompanying brief, to thus inform the Court.

6. We have notified the Solicitor General, as well as counsel for Yeshiva University and the Yeshiva University Faculty Association, that this motion and brief *amicus curiae* would be filed with the Court. Copies of this motion and accompanying brief are also being served upon those individuals.

WHEREFORE, Boston University respectfully moves that it be granted leave to file the accompanying brief *amicus curiae.*

Respectfully submitted,

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BRIEF OF
THE TRUSTEES OF BOSTON UNIVERSITY
AS *AMICUS CURIAE*

The Trustees of Boston University ("Boston University") respectfully submit this brief *amicus curiae* in support of the position of Yeshiva University, and urging affirmance of the decision of the United States Court of Appeals for the Second Circuit entered on July 31, 1978, and reported at 582 F.2d 686.

INTEREST OF THE *AMICUS CURIAE*

Boston University is a private, nonprofit educational institution incorporated under the laws of the Commonwealth of Massachusetts, and located in Boston. It is composed of 16 Schools and Colleges having a student enrollment of approximately 20,000. It employs approximately 5,500 employees, of whom approximately 2,200 are instructional personnel.

The Court's decision in this case is vitally important to Boston University because of its position in *Trustees of Boston University* v. *N.L.R.B.*, 575 F.2d 301 (1st Cir. 1978), now pending before this Court upon a petition for certiorari, filed on July 11, 1978 (No. 78-67, Oct. Term, 1978). In the latter case, the United States Court of Appeals for the First Circuit enforced an order of the National Labor Relations Board requiring Boston University to bargain with the American Association of University Professors as the representative of a unit of full-time faculty members. Included in the unit are department chairmen. Before the Board, and again before the Court of Appeals, Boston University contended that its department chairmen are supervisory and/or managerial personnel and should be excluded from the bargaining unit. In agreement with the Board, the Court of Appeals rejected the contention, stating,

inter alia, that "the Board was entitled to find that [the chairmen were acting] . . . 'in the interest' of the faculty, not the employer." 575 F.2d at 306. In its pending petition for certiorari, Boston University has urged this Court to review and reverse the ruling of the Court of Appeals with respect to the status of its department chairmen.[1]

The Board's determination regarding the non-supervisory, non-managerial status of department chairmen at Boston University rests upon premises similar to those that led the Board to conclude that neither Yeshiva's faculty as a class nor its department chairmen are supervisory or managerial personnel. In both cases, the Board found the chairmen's status to be derivative from that of the faculty as a class. Thus, in *Yeshiva*,[2] as in *Trustees of Boston University*, the Board rejected a contention that department chairmen should be excluded as supervisory or managerial personnel even if faculty, as a class, were determined to be "employees," finding that the authority of the Yeshiva department chairmen "has been effectively diffused among the department faculty pursuant to the principle of collegiality . . ." and that the chairmen "act primarily as instruments

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[1] The faculty unit at Boston University, found appropriate by the Board and upheld by the Court of Appeals, excludes the faculty of the Law, Medical, and Graduate Dental Schools. In its pending petition for certiorari, Boston University has also urged the Court to review and reverse, as "arbitrary and irrational," the unit exclusion of faculty at the latter schools.

[2] *Yeshiva University*, 221 NLRB 1053 (1975).

of the faculty . . . [and] . . . therefore stand largely on the same footing as the faculty, from whom they receive their authority." 221 NLRB at 1055, 1056.[3] A similar rationale underlay the Board's determination that the decisions and recommendations of Boston University's department chairmen constitute "collective rather than authoritarian action." (Boston University's petition for certiorari, No. 78-67, Oct. Term, 1978, pp. 94-95.)

Boston University submits this brief *amicus curiae* for two purposes. First, it believes that the rationale underlying the Board's determination that the Yeshiva faculty are not supervisors emasculates the statutory exclusion of supervisors and contravenes the Congressional policy underlying that exclusion. And second, it wishes to apprise the Court of implications of the *Yeshiva* case that might not otherwise be brought to the Court's attention. Thus, the affirmance of the Board's rationale regarding faculty as a class in *Yeshiva* will undoubtedly prompt the Board to continue to extend that rationale, as it did in *Trustees of Boston University*, to force universities to bargain with respect to department chairmen—this, despite the fact that such individuals typically exercise supervisory and managerial powers in addition to, different in kind from, and usually greater than, those exercised by faculty members. In this connection, we respectfully observe that universities

[3] The Second Circuit found it unnecessary to reach the question of the status of department chairmen because of its determination that all faculty members were supervisory or managerial personnel. *N.L.R.B.* v. *Yeshiva University*, *supra*, 582 F.2d at 694 n.8.

in general, and Boston University in particular, have no wish to occupy the unique position of being the only employers in the nation that are forced to bargain with their supervisors.

ARGUMENT

I. The Board's "Interest of the Employer" Analysis Emasculates the Statutory Exclusion of Supervisors and Contravenes the Congressional Policy Underlying that Exclusion.

The Board seeks to justify its determination that Yeshiva's faculty are not supervisors on the ground that the faculty's admittedly effective recommendations regarding faculty personnel matters—i.e., the hiring, promotion, termination, and tenure of other faculty members—are not made "in the interest of the employer." The Board has seized upon this statutory phrase[4] in the face of a record which clearly demonstrates that all the other statutory criteria for supervisory status are met. (Brief for Yeshiva University, pp. 2-26.) The Board, however, has produced neither facts nor theory to support its contention that faculty authority with respect to faculty personnel matters is dissimilar in any relevant respect from that which, in other areas, the Board routinely holds to be indicative of supervisory status.[5]

[4] Section 2(11) of the Act, 29 USC § 152(11), defines "supervisor" as an individual who exercises the authority described therein "in the interest of the employer."

[5] So, too, has the Board failed to offer any persuasive reason why the faculty's decision making powers in other areas of academic policy should not be considered an exercise of man-

The Board's contention that the faculty's authority with respect to faculty personnel matters is exercised in the faculty's own interest, rather than in the interest of the employer, is premised on two asserted grounds: (1) the faculty's recommendations are mere expressions of independent professional judgments concerning what is professionally desirable in areas in which they have interests (Brief for the National Labor Relations Board, pp. 23, 39, 49, 50); and (2) in making such recommendations, the faculty are not "expected to conform to management policies and are [not] judged according to their effectiveness in carrying out those policies" (Bd. Br., p. 32; see also Bd. Br., p. 41 and Bd. Reply Br., pp. 7-8).[6] We submit

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agerial authority. Thus, the faculty as managers select the "raw materials" (*i.e.*, the students), design the manufacturing process (*i.e.*, the curriculum to develop the educated student), manufacture the product (*i.e.*, deliver lectures and seminars), evaluate the product (*i.e.*, give grades to the student), and, if satisfied, recommend the product (*i.e.*, the student) for sale (*i.e.*, for graduation as a holder of a degree). The faculty serving as management also decide when and whether to offer discounts to customers (*i.e.*, whether or not to award a specific student a scholarship, fellowship, or teaching assistantship) which enable the student to purchase the product (*i.e.*, his education) at a substantially reduced price. There is, in fact, clearly nothing that is done by an ordinary faculty member, much less a department chairman, that is not managerial or administrative in character. This central fact was recognized by the Second Circuit in the *Yeshiva* case when it held that the Board had applied the National Labor Relations Act in a way that it was never intended to be applied.

[6] The Board equivocates in the importance it attaches to the grounds it asserts. Thus, the primary thrust of the argument in the Board's principal brief is the assertion that the faculty's

that these characterizations of faculty authority, even if accurate, would not compel a conclusion that faculty are "employees," rather than supervisors.

A. The Board's "independent professional judgment" rationale is a novel theory which, if accepted by the Court, would essentially preclude professional personnel from being considered supervisors under the Act. To be sure, the Board has long held that a professional's exercise of independent judgment and discretion in responsibly directing and coordinating the work of other employees in the delivery of the professional product is a manifestation of professional status rather than supervisory authority under the Act.[7] But the faculty's role at Yeshiva with

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recommendations are made to advance vaguely identified professional or personal goals. When pressed, however, by Yeshiva for identification of the nature of the faculty's "own interest" (Yesh. Br., pp. 50-52), the Board evasively responded that the issue was not "whether the faculty acts on personal as opposed to altruistic grounds," but rather, whether they "are required to conform to management policies in rendering their decisions . . ." (Bd. Reply, p. 8 n.6).

[7] *E.g.*, *Wurster, Bernardi & Emmons, Inc.*, 192 NLRB 1049, 1051 (1971) (Although project architects responsibly direct other employees, it is in a professional sense and does not constitute "supervision" under the Act.); *Doctors' Hospital of Modesto, Inc.*, 183 NLRB 950, 951 (1970), *supplementing* 175 NLRB 354 (1969), *enf'd*, 489 F.2d 772 (9th Cir. 1973) ("[T]he Employer's registered nurses are a highly trained group of professionals who normally inform other, lesser skilled, employees as to the work to be performed for patients and insure that such work is done. But, their daily on-the-job duties and authority in this regard are solely a product of their highly developed professional skills and do not, without

respect to other professional personnel, like the faculty's role at Boston University, is not limited to directing professors and others regarding such matters as the most effective teaching methods or the most efficient ways to conduct scholarly research. Rather, the faculty are proceeding in an entirely different area, for they are essentially determining, through their recommendations, which faculty members will be terminated, which will be promoted, and which will be granted tenure.

In the non-university context, the Board has consistently held that a professional's effective recommendation with respect to employee termination, promotion, or changes in employee status is an exercise

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more, constitute an exercise of supervisory authority in the interest of their Employer.").

We submit that it is the principle of the latter cases that is embodied in Section 2(12)(b) of the Act, 29 U.S.C. § 152 (12)(b), a section cited by the Board (Bd. Br. 22, 33 n.27) to support its contention that a professional may supervise another professional without losing his status as an "employee" under the Act. That section defines as a "professional employee" an individual who has completed prescribed courses of specialized intellectual instruction and study and who is performing related work under the supervision of a "professional person" to qualify himself to become a professional employee.

Moreover, it is certainly this concept of "professional direction" which Congress approved in passing the health care amendments to the Act in 1974. See S. Rep. No. 93-766, 93d Cong., 2d Sess. 6 (1974), wherein the Senate Committee on Labor and Public Welfare approved the Board's policy of declining to apply the definition of "supervisor" to "a health care professional who gives *direction to other employees in the exercise of professional judgment*, which direction is incidental to the professional's treatment of patients . . . ." [Emphasis added.]

of supervisory authority, even if the recommendation is based on the exercise of the "independent professional judgment" of the person making it.[8] We submit that the Board has reached a proper result in such cases, for any other result would obliterate the statutory exclusion of supervisors. Thus, any recommendation that an employee be hired, terminated, promoted, or have his status changed is inherently imbued with "expertise" and "independent judgment" as to the quality of the employee's experience, cre-

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[8] For example, in *Doctors' Hospital of Modesto, Inc., supra*, 183 NLRB at 951-952, the Board distinguished between relief head nurses whose *direction* of other nursing personnel was found to be merely a part of their professional duties and responsibilities (see n. 7, *supra*) and the floor head nurses whom the Board found to be supervisors. With respect to the floor head nurses, the Board, referring to its earlier decision on the question, stated:

> [W]e found the floor head nurses, *inter alia*, to be supervisors because, *in addition to* performing their professional duties and responsibilities, they also possessed the authority to make effective recommendations which affected the job status and pay of the employees working on their wings. Specifically, the supervisory status of the floor head nurses rests on their authority to effectively recommend pay increases, job transfers, and departmental assignments for both regular and newly hired employees. [Emphasis in original.]

See also, *University of Chicago Library*, 205 NLRB 220 (1973), *enf'd*, 90 LRRM 2844 (7th Cir. 1974), in which the administrative law judge determined that the professionals in question were not supervisors because their significant authority was limited to "professional direction." The Board, however, reversed the administrative law judge, finding indicia of supervisory status, including the authority to evaluate employees and to interview and approve applicants for employment, to be present.

dentials, performance and potential—and this is so whether the recommendation is made by a professional or by a non-professional.

Moreover, the dictates of the Act do not change simply because professionals as a class are assumed to have some type of "professional interests" which they might desire to further. To the extent that university faculty have such professional interests, those interests are undoubtedly little different from those of the university administration [9]—that is, *inter alia*, the maintenance of the institution's reputation for excellence, the delivery of educational products of superior quality, and the recruitment and retention of outstanding and respected faculty members. Faculty members recommend appointments and promotions with a clear view to these interests of the institution. Only one who is utterly cynical could argue or even suppose that the faculty do not take into consideration, in the evaluation of prospective faculty members or faculty members up for promotion and tenure, the needs of the institution and the

[9] The Board itself, to be sure, has never articulated what the "professional interests" of a university faculty are. Moreover, the attempts by the Board (Bd. Br., p. 41 n. 36) and the American Association of University Professors (AAUP Br., pp. 31-33) to differentiate between the interests of the university and faculty are unpersuasive. Both briefs assert that there may be factors—*e.g.*, the need for fiscal restraint—which may influence the university's decision making, but not that of the faculty. This argument overlooks the fact that similar circumstances occur in any business context. For example, it cannot be doubted that there are numerous instances in which a department manager or supervisor in a business corporation recommends certain actions to higher officials only to have his recommendations rejected for financial reasons.

interests of the students—the latter being "customers" in the university context. Thus, faculty members consider the teaching ability of candidates for promotion, and they also consider whether their academic subjects are duplicative and hence redundant in relation to those of other faculty members, whether they are arcane and perhaps expendable, or whether they are of central importance and essential to the intellectual balance of a department or a school. No permanent faculty could assess the merits of candidates for appointment, promotion, or tenure without taking into account these concerns which are clearly identical to the interests of the institutional administration.

The faculty's decisions and recommendations in these respects are no different from similar decisions and recommendations made by any professional in a supervisory or managerial position. The fact that an individual's "professional interests" might (indeed, almost inevitably would) coincide with the interests of the employer to whom he is authorized to render "independent professional judgments" regarding, for example, the termination of other professional personnel, does not operate to convert the authority so exercised into authority exercised in his "own interest." [10] In sum, when a faculty's "independent

[10] For example, the nursing profession undoubtedly has "professional interests" and "professional goals"—*e.g.*, the delivery of superior health care—equally as cognizable as those of university faculty. Those interests and goals can be furthered by ensuring the presence of an excellent nursing staff. Head nurses who evaluate other nurses and recommend termination, promotion, etc., are presumably motivated by professional goals and inevitably must exercise their "'inde-

professional judgments" are in the form of recommendations with respect to faculty personnel matters which are usually followed, it ignores reality to assert that those recommendations do not constitute supervisory action because they are not made "in the interest of the employer."

B. Equally lacking in merit is the Board's assertion that the faculty's authority is not exercised in the interest of the university because, in making their recommendations, the faculty are not expected to conform to "management policies" and are not judged on their effectiveness in carrying out those policies.

The Board does not identify the "management policies" which the faculty are presumably free to ignore.[11] With respect to faculty personnel, however,

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pendent professional judgment" regarding the employees' performance and potential. The fact that the head nurse's professional goals and interests are the same as those of the hospital, however, does not make the nurse an "employee" merely because his or her personnel recommendations could be characterized as "independent professional judgments" conveyed to management in his or her "own interest."

[11] As pointed out at n. 9, *supra*, the fact that, as asserted by the Board and the AAUP, faculty may make recommendations in disregard of university policies, such as a policy of fiscal restraint, is not determinative of the faculty's supervisory status. Because all departments are bound by the financial constraints of a university's resources, review of the fiscal impact of the faculty's recommendations is to be expected. Indeed, it is unlikely that the faculty would have access to the financial information necessary to determine for themselves that recommendations would be fiscally responsible. In this regard, the faculty are no different from any other supervisor or manager who submits a proposal in the hope that his employer will approve the expenditures he has requested.

a university's one predominant policy is the desire for highly qualified, effective, and well-respected individuals, and it is for fulfillment of that policy that the administration looks to the faculty. There can be little doubt that this quest for excellence is a policy to which the administration expects the faculty to adhere.[12]

C. Nor is there merit in the Board's argument (Bd. Reply Br. 3-4) that the reason for the usual unit exclusion of managerial employees and supervisors—the need to have such personnel accountable solely to management and to avoid sharing their loyalties with a union—is not here present. For the argument ignores the realities of the relationship between a university and its faculty on matters such as faculty appointment, promotion, and tenure.[13] Curi-

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[12] Boston University is aware of no precedent supporting the Board's present assertion (Bd. Br., pp. 32, 41) that faculty members cannot be supervisors acting in the interest of a university unless they are judged on the basis of the compatibility of their recommendations with administration policies. In support of its assertion, the Board cites only one case, *N.L.R.B.* v. *Fullerton Publishing Company*, 283 F.2d 545 (9th Cir. 1960), and that case is appropriately limited to issues involving the "responsibly direct" provision of the supervisory exclusion. Thus, the court there found that in order to determine whether a newspaper editor "responsibly directed" his reporters rather than merely relaying assignments, it was necessary to determine whether the editor was held answerable for the output of his department.

[13] So, too, does the Board ignore another equally important reason for excluding faculty members from the coverage of the Act. Thus, one, if not the most important, result of faculty coverage under the Act is the protection accorded to them if they strike against the university. However, a right

ously, moreover, both the Board and its supporting *amici* emphasize that a university must rely upon faculty recommendations to enable it to make informed decisions regarding the appointment, promotion, tenure, and termination of faculty. See Bd. Br., p. 38; AAUP Br., pp. 28-29; and Brief *Amicus Curiae* of the American Federation of Teachers (AFL-CIO), p. 7. And it is because of this reliance that conflicting loyalties which might affect those recommendations are no less objectionable in the university context than they would be in an industrial setting.

Thus, the relationship between a university and its faculty is, we submit, precisely the type that merits protection from the "conflicting loyalties" that arise when supervisors are permitted to form unions and bargain collectively with their employers. For in every real sense, the faculty at Yeshiva and at other

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to strike in a university context confers powers upon faculty which are unique among "employees." When a faculty member goes out on strike, he not only paralyzes the production line (education), but he assaults the customer (the student). For unlike an employer's customers in industry generally, students cannot, during the period of a strike, seek or obtain the product from other suppliers. Moreover, the relationship between students and university faculty gives the latter powers that are unique. Thus, faculty exercise complete control over their students' academic progress in the university. Consequently, when a faculty member on a picket line urges a student not to cross the line, he engages in an act of coercion, because he is capable, as a faculty member, of penalizing the student with a lower grade for having refused to respect the picket line. Contrariwise, the right of "employees" to strike in non-university sectors vests the "employees" with no such concomitant powers.

universities make personnel decisions on behalf of their employers. If those decisions, albeit based on independent professional judgment, are subjected to the pressure of labor organizations and conflicting loyalties, then both the university and the faculty will suffer.

II. The Board Should Not Be Permitted to Include Department Chairmen in Faculty Units at Universities.

An underlying issue in Yeshiva which is not directly before the Court because of the ruling of the court below is the question of the supervisory and/or managerial status of university department chairmen.

As Yeshiva has pointed out (Yesh. Br., pp. 31-33), and as we have sought to emphasize, the Board has fashioned an *ad hoc*, arbitrary body of law that is applicable only to universities and severely distorts well-settled statutory definitions and judicial standards with respect to "supervisors" and "managers." These distortions extend, moreover, beyond the confines of supervisory and managerial determinations affecting only faculty members as a class. In particular, they have resulted in the Board's frequent denial of supervisory status to department chairmen —individuals who often possess and exercise managerial and supervisory authority even more directly than do faculty as a class.[14]

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[14] For example, chairmen were included in faculty units in *Northeastern University*, 218 NLRB 247 (1975); *Fordham University (II)*, 214 NLRB 971 (1974); *Rosary Hill College*, 202 NLRB 1137, 1139 (1973); *University of Detroit*, 193 NLRB 566 (1971); and *Fordham University (I)*, 193 NLRB 134 (1971).

Thus, for example, despite a record which showed, *inter alia*, that they were empowered effectively to recommend salary increases, reappointment, promotion, and tenure, that they were the principal administrators of their departments, and that they had a significant role in the preparation of departmental budgets, department chairmen at Boston University were found by the Board to be neither supervisors nor managerial employees. (Boston University's petition for certiorari, No. 78-67, Oct. Term, 1978, pp. 94-95.) A like result obtained with respect to Yeshiva's department chairmen, the Board stating (221 NLRB 1053, 1055-56):

> [T]he chairman's authority has been effectively diffused among the department faculty pursuant to the principle of collegiality . . . .
>
> [A]lthough they have certain formal responsibilities with respect to decisions on such matters as appointment, promotion, and tenure, the department chairmen . . . act primarily as instruments of the faculty in these matters. The department chairmen, in these respects, therefore stand largely on the same footing as the faculty, from whom they receive their authority.

As the basis for its decision that the department chairmen at Boston University were not supervisors, the Board stressed that they engaged in "collective rather than authoritarian action" and it similarly found that they were not managerial employees because they had "interests . . . more akin to those of the regular faculty than to those of the administration." (Boston University's petition for certiorari, pp. 94-95.) At Boston University, however, on most questions, the decision to consult, and the degree of

consultation undertaken, is entirely within the discretion of the chairmen, and they are free to ignore the opinions of those consulted. Thus, although some chairmen choose to consult their departmental faculty on a regular basis, others do so only on certain types of questions. Indeed, as Boston University pointed out in its petition for certiorari to the Court (No. 78-67, Oct. Term, 1978, p. 23), this diversity reflects a difference in style not a diminution in authority, and the very fact that a department chairman chooses his own style speaks for his authority. In sum, if the Board remains free to find that such elective consultation dictates a finding of "employee" status, then it also remains free to find, for exactly the same reason, that university deans, vice presidents, and even presidents are also "employees." Obviously, however, any legal test that requires that such individuals be considered "employees" cannot be upheld. *N.L.R.B.* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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